IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA STATE POLICE, :

Petitioner :

v. : No. 03-95

NANCY DREW SUDERS. :

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Washington, D.C.

Wednesday, March 31, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JOHN G. KNORR, III, ESQ., Chief Deputy Attorney General, Harrisburg, Pennsylvania; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

DONALD A. BAILEY, ESQ., Harrisburg, Pennsylvania; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 03-95, the Pennsylvania State Police v. Nancy Drew Suders.

Mr. Knorr.

ORAL ARGUMENT OF JOHN G. KNORR, III

ON BEHALF OF THE PETITIONER

MR. KNORR: Mr. Chief Justice, and may it please the Court:

In its decisions a few years ago in the Ellerth and Faragher cases, this Court held that where a supervisor has created a hostile work environment by acts of sexual harassment, the liability of the employer is not strict, but rather is subject to an affirmative defense which centers around the opportunities provided by the employer for corrective or preventive action.

The question here is whether that affirmative defense should continue to be available where there is an allegation that the hostile work environment resulted in a constructive discharge, and we submit that it should.

In our view there is nothing about a claim of constructive discharge that changes the Ellerth-Faragher analysis of hostile work environments. A supervisor's acts which create a hostile work environment don't produce

strict liability because they are not acts of agency; that is, they are not the acts of the employer. They don't bear the imprimatur of the employer. They aren't ratified by the employer, and they are not the sorts of things which could only be done by somebody invoking the authority of the employer.

QUESTION: Mr. Knorr, I'm -- I had a hard time, in reading the briefs on this case, figuring out what we ought to do with the suggestion that there's a constructive discharge theory. Now, I don't think this Court has ever weighed in on that. It comes out of the labor law context I guess.

MR. KNORR: Yes.

QUESTION: I'm wondering, you know, in -- in Ellerth and Faragher, what we said was that when no tangible employment action is taken, a defending employer may raise an affirmative defense to the liability. So I'm wondering if we shouldn't just try to look at the facts in this case and ask whether what the supervisors did amounted to a tangible employment action and that would answer the -- the question.

I -- I don't know that viewing it through the lens of a constructive discharge is helpful. What she says is that the supervisors -- that she had taken tests to qualify for a promotion, that the supervisors had

hidden the results of those tests and had thereby prevented any promotion, and that there was a false arrest I guess. Now, why shouldn't we just look to see if those actions occurred, and if so, whether they amounted to a tangible employment action? Wouldn't that answer the question?

MR. KNORR: Justice -- Justice O'Connor, if we haven't made this clear, then the Court has my sincerest apologies because that is exactly what we suggest the Court should do. If the underlying actions of the supervisor amounted -- which -- which provoked the constructive discharge amounted to a tangible employment action, then there is no affirmative defense.

QUESTION: But -- but Justice O'Connor is going a little bit further than that. I think she is suggesting that there cannot be a constructive discharge without some tangible employment action because constructive discharge itself attributes to the employer the desire to get rid of the employee, and that desire cannot simply be communicated through some lower -- lower people.

Now, maybe the -- the tangible employment action is the refusal of the employer to respond when the obscene actions of -- of the -- of the coworkers here are brought to the employer's attention. That would be I -- would that qualify as tangible action in -- in your part -- in

your estimation?

MR. KNORR: I'm not sure if it would be tangible action or not, but it would certainly indicate that if the employer didn't respond, that it was in some sense ratifying or approving what it has done.

QUESTION: I mean, the point is, how can you have a constructive discharge? The only person that can discharge is the employer. You have to pin it on the employer. I don't know how -- how subordinates alone can -- can produce a situation that amounts to a constructive discharge.

MR. KNORR: That, Justice Scalia, is partly true and it partly is not true because the precise elements of what you need to prove to -- to get a constructive discharge vary quite widely from court to court. And in some courts what you say is quite accurate. There has to be some proof of an intention on the part of the employer, even if it's only through a failure to respond to a complaint, to get rid of the employee. But in other courts -- and -- and this includes the Third Circuit -- that is not really the case.

QUESTION: Well, what do you think it ought to be?

MR. KNORR: I think it ought --

QUESTION: There is a right answer to this,

isn't there?

MR. KNORR: Well, that's not a question that we've presented or that the court has addressed. In -- in our view, the right answer to that would be, yes, you have to in some sense prove employer intent --

QUESTION: Is there -- is there -- you -- you say the -- the standards vary. Is there any jurisdiction that -- for a -- that recognizes constructive discharge that does not require the employee to prove that the employee acted reasonably in relation to avenues for redress, filing grievances and so on? Is -- is there any -- is there any jurisdiction in which the employee's reasonableness in trying to adjust things before leaving is not an element of the -- of the claim?

MR. KNORR: I think that the short answer to that question is yes. There are such jurisdictions and they include the Third Circuit, but I need to be a little more expansive than that because in all jurisdictions, including -- including the Third Circuit, there is an inquiry into whether the employee acted reasonably, but -- and in some jurisdictions, that inquiry is directed to -- to the question of whether the employee tried to resolve this -- this matter internally. In other jurisdictions, including the -- the Third Circuit, the inquiry into employee reasonableness is tied only to the question of

how bad were the conditions; that is, were these conditions so bad that a reasonable person would quit? And in that inquiry, it may or may not even be relevant whether the employee tried to -- to resolve it internally.

QUESTION: But it was in the Third Circuit because the judge somewhere in that long opinion did say that the evidence that she had complained -- that that would be relevant, but not essential evidence to show the reasonableness of her reaction treating this conduct as a discharge.

MR. KNORR: I'm not sure the court went that far. The court said that -- that it might conceivably be relevant and in -- in a later --

QUESTION: I thought -- I thought it was stronger than -- than that. It may be different --

MR. KNORR: And it -- I'm sorry.

QUESTION: -- in different places because this opinion tended to say everything at least twice.

(Laughter.)

MR. KNORR: My recollection is that the court didn't give very much specific direction on what should come in on a remand in this case. As a general matter, the court of appeals was quite clear that it was up to district courts to decide whether all, some, or none of evidence about anti-harassment policies and remedial

efforts should come in. And that --

QUESTION: Excuse me.

MR. KNORR: I'm sorry, Justice Kennedy.

QUESTION: Did you finish your answer? I -- I beg your pardon.

MR. KNORR: If -- if I could.

And that inquiry, in turn, is tied simply into the question of how bad were the conditions. That is, if the conditions were bad enough, it doesn't matter if there was an anti-harassment policy. It doesn't matter if there were remedial efforts made. So the -- the inquiry, while it all is -- while it is all -- while it is always phrased in terms of employee reasonableness, can really be directed to quite different things.

QUESTION: May I ask you also to clarify? That -- you gave Justice O'Connor an answer that surprised me because she said let's stick to this case, and she said that action involving the not -- not letting her have her papers, and then the arrest, that looking at those facts, could that be -- is that the way the Court should go about it. But the district judge gave summary judgment for you in this case. Is that not so?

MR. KNORR: That's correct.

QUESTION: So, then on Justice O'Connor's facts, there would be no question whether she acted reasonably,

whether it was equivalent, whether it was equivalent to a tangible employment action.

MR. KNORR: In terms of this particular case, in our view it is a little bit -- it -- it is too late in the day to reopen the inquiry as to whether the underlying actions of the supervisors were or were not tangible. That -- that is something that should have been raised at the district court level when we raised the affirmative defense. What I -- what I --

QUESTION: But there was no trial. This was just summary judgment. There was no evidence submitted.

MR. KNORR: There -- well, there was no trial. There was certainly evidence submitted, and it seems to us that when we as the defendants say we are entitled to the affirmative defense and we are moving for summary judgment on it, it's incumbent on the plaintiff at that point to say, no, you aren't entitled even to assert the affirmative defense because we have this action and this action and this action which were taken, which are tangible employment actions, and therefore you aren't even entitled to the affirmative defense. And that didn't happen. At no point in this case has the respondent ever said that she was subjected to a tangible employment action other than the constructive discharge itself.

QUESTION: Suppose we're back before the summary

judgment stage and you're telling the trial court what the theory of the case should be. Would your theory be something like this? Whether we use the phrase, constructive discharge or tangible employment action -- and we have to use some phrase because the law works with labels -- we're interested in the practical aspects of -- of these cases, and one of them is this. Were there avenues of redress? And if the employer was -- employee was unreasonable in not following these avenues of redress, then there can be no constructive discharge or tangible employment action. Is that your position?

MR. KNORR: No, Justice Kennedy, and I -- I guess I --

QUESTION: It sounds like a good position. Why isn't that your position?

(Laughter.)

MR. KNORR: Our -- our position really is that this case and -- and hostile environment cases generally which are alleged to be constructive discharges are just like Ellerth, that what you do is you look at what the supervisor did to the employee to provoke the discharge, and if those actions were hostile work environment, if they were -- if they were -- I hate to use the word merely, but if they were acts of sexual harassment, not arising to tangible actions, if the employee had simply

sued on the hostile work environment, we'd have an affirmative defense. Our position is that doesn't change or it shouldn't change because there is also a claim that it was so bad that I had to quit.

QUESTION: How is that different from the formulation that one component in almost all cases of constructive discharge or tangible employment action, whatever you want to call it, is the existence or nonexistence of avenues for redress, and if they did exist, whether the employee took reasonable steps to follow them.

MR. KNORR: If that were true across the board, Justice Kennedy, there would be no difference. You're -- you're entirely correct.

QUESTION: Why does --

QUESTION: Then why --

QUESTION: I'm sorry.

QUESTION: No, no please.

I was -- why isn't the way to simplify the problem and decide this case for us to say in order to have constructive discharge, there has got to be the element that Justice Kennedy just described, i.e., avenues of redress, reasonableness on the part of the employee in availing or perhaps in some cases not availing of them? If that element is shown, then there is no point in

recognizing the affirmative defense because that is in pretty clear contradiction to one element of the affirmative defense. And -- and that would make for a fairly simple body of law. Why -- why isn't that the appropriate way for us to go?

MR. KNORR: I think that is certainly a way to go, Justice -- Justice Souter. If it were -- if it were clear across the board in all jurisdictions that to prove a constructive discharge, you do have to have made some effort to invoke a remedial process, just as with the affirmative defense, then that would certainly -- that would certainly satisfy our concerns.

QUESTION: Why does a -- why does a plaintiff bring a constructive discharge suit instead of just a regular sexual harassment suit? Is it -- is it a matter of getting more damages? Is that the reason for --

MR. KNORR: Yes, I think so.

QUESTION: -- for couching it in those -- in those terms?

MR. KNORR: Yes, because then you've got the -- the lost wages and so forth for -- for the entire time.

QUESTION: I'm troubled by that too. I mean, I don't understand why we're using that term at all in light of the case background here. Why isn't it couched in terms of allegations of sexual harassment and tangible

employment action?

MR. KNORR: That is -- that is the way we think that it should be couched, Justice O'Connor. The -- the use of the constructive discharge is -- was the plaintiff's choice, of course, and --

QUESTION: But that -- that too is the Third Circuit's theory in the case. They very much relied on the analogy to constructive discharge, didn't they?

MR. KNORR: Yes. I think that their -- their view is that a constructive discharge is -- is just the same as an actual discharge.

QUESTION: No -- no court has rejected the constructive discharge. The question is how do you define it. And you said, in response to Justice Souter, that it would be fine if you said, plaintiff, you're in this situation, you're claiming constructive discharge, you come in and -- and, in effect, negate what would otherwise be the affirmative defenses. But they --

QUESTION: Well, I -- I thought two circuits hold that a constructive discharge is never a tangible employment action. I mean, that's part of the problem.

MR. KNORR: Yes. That's -- that is correct. And -- and frankly, I don't think that is a correct analysis either. Our view is that a -- a -- in a -- in a sense a constructive discharge can't ever be a tangible

employment action because it isn't an action at all. It's just a construct. Our view is you look at -- to what it is that the supervisor did, and if that's a tangible employment action, then there is no affirmative defense, whether -- whether or not the employer is --

QUESTION: But there's an -- there's an intermediary situation and that's the one where there is a tangible action like you get demoted or you get transferred to a -- a worse position. And that -- that's one category. Another category is you say I was harassed constantly and that amounts to constructive discharge. Another is they did take a tangible action against me, they didn't discharge me, but they were so bad in harassing me and in this demotion, that it amounted to a constructive discharge. That -- that constructive discharge is the label used for that too, isn't it?

MR. KNORR: It can be. An employee can certainly say I was -- I was subjected to a humiliating demotion and that was so bad --

QUESTION: So I quit.

MR. KNORR: -- that I quit. Had she just sued just on the demotion, clearly a tangible employment action, and we would have no affirmative defense. If she also goes on to say, and it was so bad that I quit, I think we again should not have the affirmative defense.

QUESTION: But the Seventh Circuit goes the other way on that.

MR. KNORR: Yes, they do. Yes, they do.

And by the same token, if the employee simply says, I was sexually harassed and subjected to a hostile work environment, we would have the affirmative defense. If she goes on to say, and --

QUESTION: Is that true even if the person who did the harassment and so forth but did not otherwise take a tangible action, was the president of the company and said -- made the -- the workplace impossible to have it for the employee and she quits. Would that be a tangible employment action?

MR. KNORR: I don't think you'd reach that question, Justice Stevens. I -- I think what would come into play there is the idea that there are -- there are some people in every organization who are so high up that they are proxies for the employer itself.

QUESTION: Right.

MR. KNORR: And so it -- it really is --

QUESTION: And that person who's a proxy does not commit a -- make a -- a tangible decision, doesn't fire her. He just makes it impossible for her to work. Would that be actionable or not?

MR. KNORR: That would be actionable because it

is the action of the employer, and you don't even have to get into the question of whether it is an agent of the employer or not.

QUESTION: Even though it was a tangible -- even though it was a constructive discharge.

MR. KNORR: I think at that point it -- that is all irrelevant because what you're talking about is the act of someone who is the proxy of the employer and therefore the employer is responsible for it.

Mr. Chief Justice, if I could reserve the balance of my time.

QUESTION: Very well, Mr. Knorr.

Mr. Gornstein, we'll hear from you.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. GORNSTEIN: Mr. Chief Justice, and may it please the Court:

An employer is strictly liable for a constructive discharge in any harassment that has preceded it only when the constructive discharge comes about as a result of an official company act, such as a demotion. If the constructive discharge comes about as a result of a supervisor's creation of a hostile environment, then the employer has an affirmative defense and can show that the

plaintiff unreasonably bypassed available opportunities for correction.

Now, the requirement of an official company act as a predicate for strict liability comes from the Court's decision in Ellerth and is supported by two important considerations.

First, a company act is the kind of act that is likely to be documented and subject to higher levels of review, and so it's the kind of act over which the employer can exert the most control. And that heightened potential to control makes it fair to hold the employer strictly liable, even if in a particular case the employer would otherwise be able to show that it acted reasonably and the plaintiff did not.

It -- it -- second of all, furthering title VII's -- the -- recognizing the affirmative defense when there's not an official company act, furthers title VII's prophylactic purposes because it gives the employer an extra incentive to create policies that will help to prevent discrimination from occurring in the first place and it gives employees an added incentive to complain before problems become Title VII violations.

QUESTION: Well, how do you think we should analyze this particular case in light of the Third Circuit's treatment? How does this fit into your formula?

MR. GORNSTEIN: Well, in this -- in this case you might want to -- what I was going to go on to say is you might want to initially decide the logically antecedent question of what it takes to -- to make out a constructive discharge claim in the first place. And if you did that, you should say that to prove constructive discharge, a plaintiff has to show that there's no reasonable other alternative other than to resign. And a plaintiff who has unreasonably bypassed an available opportunity for correction can't make out a constructive discharge claim in the first place.

QUESTION: When you -- when you posit that reasonableness requirement, I take it you -- you mean to include that the employee must show either that the employee reasonably availed herself or himself of whatever grievance procedure there was or at least had a reasonable basis for not doing so.

MR. GORNSTEIN: That -- that's correct, Justice Souter.

QUESTION: Now, if -- if you do that, what is -- what is left of the affirmative defense, whether there was -- whether there was a supervisor involved or not, because the affirmative -- as I understand the affirmative defense, the affirmative defense is inconsistent with that showing?

MR. GORNSTEIN: Justice Souter, you are right with respect to the constructive discharge claim itself; that is, proving the constructive discharge will necessarily negate the affirmative defense to the constructive discharge claim. But that --

QUESTION: So why don't we stop right there?

MR. GORNSTEIN: Because it doesn't necessarily negate -- proving the constructive discharge doesn't necessarily negate the affirmative case -- defense to the claim of a hostile work environment that preceded the constructive discharge.

QUESTION: Yes, but the hostile work environment claim -- and if -- if we're going to recognize constructive discharge, hostile work environment I -- I presume has been subsumed under constructive discharge because constructive discharge says, hostile environment plus something more. And we've been describing the plus something more. And -- and in order to prove the plus something more, you've got to prove, as you said, something which is inconsistent with the affirmative defense.

MR. GORNSTEIN: Let me try to explain to you how this could come up. You could have a situation in which at the moment of resignation, the plaintiff was reasonable in believing that there was nothing she could do other

than to resign and reasonable in bypassing the available procedures at the moment of resignation, therefore, could prove a constructive discharge. But it may have been the case that at a prior point in time, she would have been unreasonable in failing to complain about the harassment and therefore be vulnerable to the affirmative defense on the hostile environment claim even though she's proven her constructive discharge.

QUESTION: I understand what you're -- I understand what you're saying, but I -- I would suppose that if -- if the evidence shows that it was -- that there was a point at which she could have resolved this or at least a point at which it would have been reasonable to pursue grievances and so on to resolve it, and she didn't do it, that she's going to lose. In other words, if -- I -- I don't -- I don't see how she's going to get to the point that you describe.

MR. GORNSTEIN: The -- the way that she would get to the point that I described, Justice Souter, is if you had an escalating kind of harassment and at the last act of harassment, it would have been reasonable that -- for the plaintiff to leave at that point -- let us say the supervisor does a lot of things, and then on the last act says, if you come back tomorrow, you're dead.

QUESTION: I -- I see your point. I -- I have

one question in response to the point, and that is, if -- if we -- if we construct a system that -- that recognizes the possibility that -- that you just described, are we going to have a system that is just so darned complicated that it's going to be too difficult to administer?

In other words, every case is going to involve allegations of what you just say, denials of those allegations. In order to have an administrable system, shouldn't we simply say that if you can prove the constructive discharge, if the -- if the element includes the unreasonableness on grievance, no affirmative defense, and just get over with it simply because otherwise it would be just too complicated a system?

MR. GORNSTEIN: Justice Souter, it would be a simpler system, but the -- the system we are proposing really is just superimposing on this problem the same structure the Court created in Ellerth and Faragher. The Court could have devised a simpler rule in Ellerth and Faragher.

QUESTION: You're saying it's my fault.

MR. GORNSTEIN: Well --

(Laughter.)

MR. GORNSTEIN: I'm saying that the Court took into account various competing considerations in -- in structuring it, and it made for a somewhat more

complicated scheme.

QUESTION: But it wasn't --

QUESTION: Mr. Gornstein, could tell us what the Government proposes that we do in this case?

QUESTION: Yes. That's what I want to know.

QUESTION: You -- you asked us to remand because why?

MR. GORNSTEIN: We would say that you would remand because it is possible that there is a -- an official company act that caused the constructive discharge.

QUESTION: To wit.

MR. GORNSTEIN: To wit, the sequence of events leading up to the arrest, and that the arrest might be -- we're not saying that it is -- but it might be an official company act. If it is and the plaintiff could show that that act left her with no reasonable alternative other than to resign, you would have a constructive discharge that leads to strict liability.

QUESTION: How -- how could the -- how could the arrest by an official company act?

MR. GORNSTEIN: It could be an official company if it is only the sort of thing -- if it depends on a grant of authority from the employer to the supervisor and it's only the sort of thing that a supervisor could do.

QUESTION: But it patently is not so. I mean, it -- it has nothing to do with employment. You don't -- you don't arrest somebody because he's your employee.

MR. GORNSTEIN: Justice --

QUESTION: I mean, it -- it seems to me that -- that this action you're concerned about is not an employer type of action. It is -- it is quite apart from employment.

MR. GORNSTEIN: Justice Scalia, I think it could be that you're right about that, but it also may be that it's the type of action where the -- the person was wearing both hats, as a supervisor and as a law enforcement officer, and that it was the -- only the sort of thing that a supervisor could have done. And all we're saying is that should be fleshed out.

If you don't think that should be fleshed out, if the Court didn't think that that was a possibility, then there wouldn't be the need for the -- the remand. You could just decide it without a remand and -- and reverse on the grounds -- to get back to Justice Souter's point, you still, under my scenario have to get to the question of whether a constructive discharge is a tangible employment action.

QUESTION: Suppose that the tangible employment action -- say, a demotion or an arrest or a firing --

could have been avoided if the employee had been prompt and reasonable in pursuing avenues for relief.

MR. GORNSTEIN: In that --

QUESTION: And a reasonable employee in that position would have done that and they didn't do it. Then it escalates. Then there's the discharge.

MR. GORNSTEIN: Then in that situation, there's a constructive discharge, but there's a potential defense to the harassment claim that would depend on whether the constructive discharge is itself a tangible employment action. It only is a tangible employment action if it's brought about by an official company act, such as a demotion. If it's not brought about by an official company act, then the affirmative -- no affirmative defense for the constructive discharge because that's been negated by proving constructive discharge. But there is affirmative defense for the prior acts leading up to it that are framed as a claim about hostile environment. There would be an affirmative defense to the hostile environment claim if the hostile environment culminates in a constructive discharge that's not effected by an official company act.

QUESTION: I -- I thought the first -- the last thing you said I thought is already there in Ellerth, either at least your tangible discharge or it doesn't or

does. You have to show, you know, that they were reasonable in not making -- take advantage of a -- of a complaint procedure, and insofar as it doesn't, Ellerth already says that there's a -- there's an affirmative defense and we had a reasonable complaint procedure in place. So I don't really see that problem.

Nor do I see the problem with the Third Circuit. The Third Circuit says working conditions were intolerable, so intolerable a reasonable person would have concluded there was no other choice but to resign.

MR. GORNSTEIN: May I answer, Mr. Chief Justice?

QUESTION: Briefly, yes.

MR. GORNSTEIN: Yes. The -- what's that's missing is there is that Ellerth requires an official company act to have a tangible employment action as a -- not just a change in status from being employed to not being employed. And if there's not an official company act, then the employer has the affirmative defense.

QUESTION: Thank you, Mr. Gornstein.

Mr. Bailey, we'll hear from you.

ORAL ARGUMENT OF DONALD A. BAILEY

ON BEHALF OF THE RESPONDENT

MR. BAILEY: Mr. Chief Justice, and may it please the Court:

Pursuant to title VII, the general rule has been

is that employers are liable for the discriminatory acts of their supervisors. The question presented is whether a constructive discharge is the equivalent of a formal discharge.

One of the greatest difficulties in dealing with the law that we're addressing today is one of semantics. A formal discharge is the equivalent of a constructive discharge by definition. It is a -- it is a matter of methodology.

The United States and the petitioner would have this Court define the culpability of the employer for the supervisor's acts as a matter of official act. That leads this Court down an incredibly complex road of -- of definitional problems.

If the Court goes back to Meritor, the Chief Justice's opinion, where the Court held clearly there is no automatic liability for the employer's being responsible for the wayward acts, clearly outside the scope of employment, clearly not authorized, but we're not going to find a -- a -- an automatic liability.

What the United States wants to do and why the respondent believes that the Third Circuit -- that the Third Circuit Court of Appeals decided this case properly is to devise a general rule and underline if proven, if the constructive discharge is proven, then the obvious

occurs. It's a tangible employment action.

QUESTION: Well, but that's the whole question that is presented in the -- in the question here. I mean, I don't think you can just say it's obvious.

MR. BAILEY: Well, it's -- it's the -- to go back to some of the questions that Justice Souter was -- Souter was raising, the issue of the -- of the constructive discharge, when proven, reaches a point as a practical matter in litigation that the affirmative defense is no longer viable. And the issue in the question presented is when a -- if -- if we stick to that issue, is that is a constructive discharge a tangible employment action. Conversely, isn't it reasonable to assume that a constructive discharge, if proven, is an official company act?

QUESTION: But isn't it the same?

QUESTION: Why? Why? Why is that? It seems to me what you're saying is that up to the point where the harassment reaches such a level that a reasonable person would leave, up to that point, the individual could not sue the employer because the employer is not responsible for it. But suddenly when it goes over the edge and it's even worse and the person says, I'm going to leave, suddenly the employer is automatically responsible for it. Why -- why -- that doesn't make any sense at all.

MR. BAILEY: Your Honor, I believe -- Justice Scalia, I believe the -- the -- you can sue the employer. The issue -- and that's -- that's the hostile work environment claim that -- that this Court was really addressing in Faragher. The issue becomes --

QUESTION: You -- you can sue, but you're going to lose unless you show that there was some official action on the part of the employer that -- that caused this or -- or that the employer didn't have a -- a means of remedying it.

MR. BAILEY: Well, the case would then become a hostile work environment case.

QUESTION: Exactly.

MR. BAILEY: There would not be a tangible employment action. This -- the -- the employee can still sue. The issue then becomes that the affirmative defense is available. The issue here is the affirmative defense is not available.

QUESTION: Why? I don't understand. I mean, that's my point. Why is it that up to the point -- you know, there's terrible harassment, and the employer could -- and the employee could sue. But if the employee sued the employer, she would lose. But when it goes just -- just an inch further and is justifiable cause for her to quit, all of a sudden the employer becomes responsible for

what he was not responsible for earlier. That -- that doesn't make any sense to me.

MR. BAILEY: Okay. I -- I don't think it's -- it's a situation where the employer is not responsible. It's that the employer has mechanisms available to -- if proven, again, if -- if they can prevail on the affirmative defense to counteract the charges of hostile workplace harassment.

QUESTION: Okay. May -- may I interrupt you with -- with this question because it goes to Justice Scalia's question?

Isn't -- for the reason you just gave, isn't the reason that the claim goes from a hostile environment for which there's a defense to constructive discharge for which there isn't a defense -- isn't the reason that in order to get from hostile environment to constructive discharge, the employee has to prove something that she didn't have to prove merely for hostile environment?

MR. BAILEY: Yes.

QUESTION: And that is the element -- we're -- we're assuming.

MR. BAILEY: Yes.

QUESTION: That is the element that she either reasonably availed herself of -- of the -- of grievance mechanisms or was reasonable in not doing so. And that's

the element that gets her to the more serious claim, and it's also the element that is inconsistent with the affirmative defense. Is -- is --

MR. BAILEY: No, Your --

QUESTION: Is that fair to say?

MR. BAILEY: No.

QUESTION: Okay. Tell me -- tell me why not.

MR. BAILEY: It's -- it's putting cart before the horse. It's taking the burden that this Court carved out in Faragher and Ellerth and it's putting a burden on the employee which, as a practical matter, the employee has to carry anyway in proving the constructive discharge. We are back at the original question that you asked.

QUESTION: Yes.

MR. BAILEY: And -- and we're back where the Third Circuit in its -- in its opinion underlined if proven, held that if the constructive discharge -- if the constructive discharge is proven, the affirmative defense -- and even the -- the United States admits this -- is in all likelihood not a cogent defense at that point, the constructive discharge has been proven. That's --

QUESTION: Is the availability of avenues of redress and -- coupled with a showing that there was no pursuit of those reasonable avenues of redress, is -- are those components or facts relevant to determining

constructive discharge?

MR. BAILEY: Yes, they are relevant in this sense.

QUESTION: Then we're not arguing about very much. Justice Souter says the constructive discharge is then inconsistent. Maybe another characterization would be superfluous. I mean, the reasonable -- the reasonable attempts to obtain redress is inconsistent. I -- I think maybe superfluous. What are we arguing about here? Not very much.

MR. BAILEY: I respectfully disagree. Justice Kennedy, in the process of proving the constructive discharge, the salient factual issues that by implication you refer to are going to arise. The employer is going to have an opportunity in -- in the real case in controversy in the district court or during litigation and discovery of addressing issues and answering questions about -- and this is where we get into a great difficulty with the position of the United States. You know, when does the employee -- when does the employee have a responsibility to come forward?

MR. BAILEY: Well, it isn't the responsibility of the employee I'm concerned about. It's the responsibility of the employer. And I don't agree with your description of -- of what the rule is. That is, if

there were no grievance procedures available -- and that I agree ought to -- ought to pin -- pin the tail on the employer. It's his fault and I'd hold him for the constructive discharge. But you say if they were not available or if she reasonably didn't use them, well, I mean, these -- these renegade employees who were -- who were performing these acts of sexual harassment -- suppose they tell her if you file a grievance, we're going to kill you. Now, I'd say that's pretty reasonable for her not to file a grievance. But is that the employer's fault? How -- how does that somehow attribute all of this action to the employer? She should sue these individuals.

MR. BAILEY: Justice Scalia --

QUESTION: He -- he has in place the grievance procedures. The fact that they threatened her life is -- is not at all his responsibility. So how do you -- how do you attribute to him a constructive discharge? I don't see it.

MR. BAILEY: Justice Scalia, it begs a multitude of questions. Those questions relate -- and they're probative. They're of probative value in any litigation. And they relate to how that -- that scheme, that remedial scheme, the internal, private remedial scheme, how it is enforced, how it's policed.

QUESTION: That's fine. But so -- so long as

you're willing to acknowledge that the mere fact that she was reasonable in not resorting to the grievance procedures, does not establish that it's the employer's fault. So long as you accede to that, you say that's all up for -- for proof in -- in the -- fine. Then -- then I'll agree with you. But you're not willing to concede that.

MR. BAILEY: No, Justice Scalia.

QUESTION: So then -- so then it's not true that it's all available to be discussed in the -- I mean, what are you saying?

MR. BAILEY: What -- what I'm saying --

QUESTION: It's either relevant or it's not relevant. Now, which is it?

MR. BAILEY: It's relevant and it's probative in the conduct of the case, but it's not dispositive of a -- of a constructive discharge being --

QUESTION: Why is it relevant then?

MR. BAILEY: -- being a tangible employment action.

The relevant facts -- the employee's conduct is always going to be a relevant fact situation for a jury or a court sitting as a fact finder to hear, to contemplate, and understand. There are issues --

QUESTION: There's not an ounce of evidence of

any -- any -- activity by the employer. Not an ounce of any -- he has in place a wonderful grievance procedure and the only problem is they threatened her life. And that's why she didn't use it. Now, what is -- what is there for the jury to -- to consider?

MR. BAILEY: As a matter of law, it dispenses with the definition that set this Court on the road to Meritor and Ellerth and Faragher, and that is the definition of an employer in Title VII law. Of course, it's the employer's act, if it's an official act, and if there are issues that are --

QUESTION: Threatening her life is an official act by -- by his employees.

MR. BAILEY: To the extent the -- how do we define the employer? The board of --

QUESTION: I mean, I cannot imagine an act that's more ultra vires. I cannot imagine an act more unofficial than that.

MR. BAILEY: Justice Scalia, I -- I may not -- I may not be understanding your point. I apologize for that. But if I do -- if I do understand it correctly, we are now down the road embarking into a multitude of definitions of what the employer is, while in reality to an employee in the workplace, invariably the employer is that immediate supervisor who, as described in -- in

Faragher and Ellerth, has the power to make those tangible employment decisions. And to that employee --

QUESTION: May -- may I just interrupt there because I want to get one thing clear in mind? Is it your view that the constructive discharge can only be caused by a person with the authority to take a tangible employment action?

MR. BAILEY: No.

QUESTION: So your argument would apply whether -- if it's just coworkers as well as supervisors.

MR. BAILEY: No.

(Laughter.)

MR. BAILEY: I -- I think -- I think it can be both. I think, as correctly defined by this Court previously, there are certainly situations where by negligence -- in fact, the law of constructive discharge across the length and breadth of our country does include the reality that there are circumstances where there's ratification by omission, acquiescence and negligence --

QUESTION: Well, --

MR. BAILEY: -- of the acts of -- I'm sorry.

QUESTION: Let me just put the -- a little easier question for you. To what extent in your view is the -- is the -- is it relevant that the person who did the harassing conduct has some status, enough authority to

impose a tangible employment action? Is -- to what extent is it relevant?

MR. BAILEY: It's -- it's relevant to the extent of imputing that responsibility to the broader employer, the supervisor in other words. It's relevant. But --

QUESTION: And if it's -- but if it's not such a person --

QUESTION: But not conclusive. Right?

MR. BAILEY: I'm sorry.

QUESTION: But not conclusive.

MR. BAILEY: I think in --

QUESTION: Just -- just one of a whole mishmosh of things that we sort of chuck at the jury.

MR. BAILEY: Well, I -- I think in -- as I understand the original question, we're referring to a coworker-induced discharge, let's say, or -- or involuntary quitting. And in that case, Justice Scalia, I -- I believe you -- you are certainly pointing at something here because the standards of proof factually and perhaps legally are different. They still go, however, at their core to the conduct and actions of the supervisor.

Now, unquestionably, the supervisor -- the supervisor's actions are not authorized by the employer. Clearly they're not. The imputation that the Congress

made of employer liability for agent actions was a policy consideration goal and this worked, in an effort to balance judgments and to balance realities in the workplace and achieve justice in terms of what is fair if you have that hardworking employer who works very, very arduously at structuring a workplace program and enforces it -- not the case here -- but enforces it and follows through with it, there should be some recognition, some issue of mitigation.

And under those circumstances, of course, depending upon what the trial court finds and -- and depending upon how this Court decides that constructive discharge if it is a tangible employment action, how -- what role it plays and what -- what the demands or requirements this Court would have in Title VII situations so that -- so that -- the official act, which the Government would say is not a tangible employment action, in reality has to be. It's a semantic distinction without a difference.

QUESTION: Well, I don't follow what you said even in the context of the facts here. You said it's not the case that there wasn't -- that there was in place a good grievance procedure and that she availed herself of whatever she could avail herself of. I think that's very murky in this case. She tells one story. The EEO officer

tells another story, and we don't know how grievances have been handled in this workplace, whether it has been effective for other employees in the past. We just don't -- we have -- how can you make a judgment one way or another about the effectiveness of this grievance procedure on the basis of the evidence that's now in the record?

MR. BAILEY: Justice Ginsburg, you are correct in the sense that the facts of the record reflect that the employee, Nancy Suders, went to the -- the top dog in the Pennsylvania State Police in the affirmative action and discriminatory area, as a result of education she received on a test -- in a seminar taught by that person and because she could not locate an appropriate form.

Now, technically speaking -- technically speaking -- and the district court didn't even get into this, but to do fair and honest response to your question, Nancy Suders did not go and acquire the exact form. She could not find it. She couldn't locate it. It wasn't posted.

The record will indicate that in fact Nancy Drew Suders did complain. That complain found -- complaint found its way to the bureau of -- of the IAD, you know, where they -- they look at professional responsibility. She didn't have the correct form, quote/unquote, according

to the record.

Now, if that's not availing herself -- that's a factual determination that has to be made either as part of a -- a decision at law by the court as to whether a constructive discharge has been proven. And I assume in the litigation process at some point the trial judge is going to look at that record, is going to look at what is presented. They're going to be considered -- considering points of charge and a motion by the defendant to -- to be given permission to present an affirmative defense. To go back to what the Government even admits, in many circumstances -- and to questions that were raised by -- by other Justices here, in many circumstances the -- there will be no affirmative defense available because the constructive discharge will have been proven.

Now, in this particular case, in the facts in this case, Nancy Drew Suders -- and I think this is what offended the sensibilities of the Third Circuit, and -- and -- and the Third Circuit said that even --

QUESTION: Are you suggesting that the Third Circuit decided the case the way it did because its sensibilities were offended?

MR. BAILEY: Legal sensibilities, Justice Rehnquist -- Chief Justice Rehnquist.

QUESTION: That's as hard to figure out as

constructive discharge.

(Laughter.)

MR. BAILEY: Well --

QUESTION: But it -- it --

MR. BAILEY: Justice Kennedy --

QUESTION: It seems to me that -- that both sides point the finger at the other and say you're using labels. Your -- your brief says a constructive discharge is a tangible employment action. And I -- and I assume you argue that there's no affirmative defense.

MR. BAILEY: Yes.

QUESTION: So the -- the label is of -- of immense importance.

MR. BAILEY: Yes, it is. The label -- and -- and you made reference in earlier arguments this issue of label --

QUESTION: Depending on -- depending --

MR. BAILEY: -- legal labels --

QUESTION: The -- the question is, what does it consist of?

MR. BAILEY: Well --

QUESTION: But you're very unclear on what the employee has to prove to establish constructive discharge. It's very vague to me what it is you say the employee has to prove with regard to the availability or lack thereof

of employer remedies.

MR. BAILEY: Well, it's an objective person test. The employee has got to prove that the harassment was so intense and intolerable --

QUESTION: As to remedies available by the employer, it is unclear to me what position you take on what the employee has to prove. That the employer had no remedial scheme in place or what is it?

MR. BAILEY: I -- I believe that the remedial scheme is not relevant for two reasons. The remedial scheme is not relevant because the employee cannot avail themselves of the procedures in a procedural due process sense of a in-place employer remedial scheme because they are, in the case of a formal discharge, fired, in the case of a constructive discharge, precluded because they are really fired. Formal discharge equals constructive discharge equals official act.

QUESTION: I'm sorry. I don't understand that part.

MR. BAILEY: Yes.

QUESTION: The part I don't understand is when you say they are precluded from using a -- a corrective opportunity, a preventive or corrective opportunity because they have been fired. I think -- doesn't that beg the question?

Imagine an employer who has notices in print 4 inches, black print all over the place pasted. If anyone here creates a hostile work environment, threatens you in any way, does anything, I want you to phone this emergency number immediately 24 hours a day, and we will correct it. And -- and the -- the employee, who is totally not blind, in fact teaches a class that that's what they're supposed to do --

(Laughter.)

QUESTION: -- and now is subject to terrible harassment, but does not avail herself of those procedures for no understandable reason. Has that employee made out a claim of constructive discharge? Of course, I think obviously, the answer is no, she hasn't.

Now I want to know what you think.

(Laughter.)

MR. BAILEY: I -- I believe that you are correct, Your Honor. You're correct.

(Laughter.)

QUESTION: All right. Now, fine. Now, and if I am correct, if you believe I am correct --

MR. BAILEY: And that's --

QUESTION: -- doesn't the argument in this case simply disappear? Because all you have to say is there is no constructive discharge as long as there was a

preventive or corrective opportunity in place and the employee was unreasonable in failing to take advantage thereof.

MR. BAILEY: I -- I --

QUESTION: So if the employee was reasonable in not taking advantage, she's constructively discharged. But if she's unreasonable, she is not.

MR. BAILEY: I -- I -- that part is correct. I -- I believe your --

QUESTION: That's the whole thing.

MR. BAILEY: Well, I believe your analysis is erroneous until when what is brought into what's actually going to occur is an application of the reasonable person standard. Your hypothetical quite clearly would put a horrendous burden on an employee unless perhaps that employee is so traumatized, they don't have any faith in those great big 4-inch black letters.

QUESTION: Fine, and if the traumatized employee by the judge or jury is determined to have been reasonable, she wins. But if she's unreasonable, she loses like any other reasonable person test in the law. What's the problem with that?

MR. BAILEY: Assuming that what has occurred in that process is we've reached a hiatus where the employee has either proven the constructive discharge, the issue

then becomes what the issue in this case is. The affirmative defense is then not available. We've reached the same conclusion.

QUESTION: Yes, of course, I'm saying the affirmative defense is not available because there's no need for it. That's what we've been talking about, I thought, the last half hour.

MR. BAILEY: Your Honor, I don't disagree with that.

QUESTION: Now, do you win this case, by the way? Because the -- the Third Circuit seemed to say, as I read it, that in not taking advantage of the available opportunities, your client was reasonable. In other words --

MR. BAILEY: My -- my client's actions were reasonable.

QUESTION: Is that what the Third Circuit said?

MR. BAILEY: That was the Third Circuit conclusion, that my client indeed did act reasonable or -- or at very best, when the district court granted summary judgment, there was a disputed material fact as to whether or not there was a plan that was in effect and Nancy Drew Suders took advantage of it. And then the court --

QUESTION: Well, if that's true -- if that's true, the case has to go back.

MR. BAILEY: I disagree. I -- I was going to conclude, if -- if I may, Justice Kennedy.

Then the court says -- and they use the word -- let's look at the last day. If there's any question, let's look at the last day. And if we look at the last day, Nancy Drew Suders is brought in. The bathroom, the toilet seat, the handle, everything is dusted with stuff -- powder. Her test results are taken. They're stuffed in the lingerie drawer. Nancy Suders happens to find them. They set the room up, and Nancy Suders is brought in and her hands are photographed and she's read her rights. And she's called a thief repeatedly and she's told she can't leave. And then finally, hands shaking, having drafted a resignation letter, she presents it.

So until the last day, which is where the hypothetical I was left with ended, it might be arguable that Nancy Drew Suders -- if we want to craft a rule which says -- and we -- and if it's possible to do -- which says there is some point in time where the burden arises for the employee to take a countermeasure or counteraction, when is that? How do we do that? How can we craft a general rule that way?

QUESTION: Just like you always do in the law. It's a question of reasonableness.

MR. BAILEY: I -- I agree.

And in this case Nancy Drew Suders did every conceivable thing that an employee could do, including contacting the head of the affirmative action in the department --

QUESTION: But as I tried to suggest before, Nancy Drew Suders and the head of the equal employment gave different versions of what happened in the -- in the only encounter that those two had, which was very far down the road. So is it -- if -- if the system works, if there's ample notification of it -- because she went -- the first -- the first episode Suders says, I think I may need your help. Nothing specific at all about what's going on. And then very far down the road -- one question is did she complain too late. What would have happened? How would this -- how can she say constructive discharge or anything if, had she been diligent about complaining, maybe none of this would have happened?

MR. BAILEY: Well, the facts in the case would indicate that she complained not only to Virginia Smith-Elliot who blew her off -- by the way, she only worked there for 5 months. She complained to a State Senator. She did everything. She went looking for help. She was frightened. She could do nothing at this rural barracks at this station.

The issue then becomes, in terms of -- of if --

if we're looking at her actions in terms -- in a context of did she take -- did she assume that employee burden of reasonably responding, putting all of those things together, that's where the Third Circuit I think correctly analyzed that there -- that that Nancy Drew Suders acted reasonably. She was subjected to horrendous conditions at work.

She did go elsewhere to complain. She complained to Virginia Smith-Elliot. It's -- the difference is that Virginia Smith-Elliot said that Nancy Drew Suders complained about age and a number of different complaints that were being -- or -- or mistreatments she was suffering, but that she did not raise sexual harassment as an issue. That, indeed, is ironic on the record when you look at these --

QUESTION: Thank you, Mr. Bailey.

Mr. Knorr, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JOHN G. KNORR, III

ON BEHALF OF THE PETITIONER

MR. KNORR: If it were really true that to prove a constructive discharge and a central element of that proof would be that the employee either invoked a remedial process or reasonably failed to do so, if that were required as an element of constructive discharge, that would go a very long way toward meeting our concerns in

this case. That is not, however, the current state of the law, at least not in all jurisdictions. That is really the only point I wanted to reemphasize on rebuttal --

QUESTION: You -- you would find it acceptable that she didn't do it because they threatened to kill her and -- right? That's certainly reasonable basis not for filing a complaint, and that -- that would attribute the whole thing to the employer.

MR. KNORR: Justice Scalia, that I wouldn't say is acceptable to us, but that problem --

QUESTION: You could live with it.

MR. KNORR: That problem --

QUESTION: It's not very logical, though, is it?

MR. KNORR: It is a problem that inheres in the Ellerth-Faragher affirmative defense from the beginning, and we have taken that defense as we found it. I -- I agree that it is not entirely satisfactory to us, but that is where we are.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Knorr.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)